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The Third Conference on the Law of the Sea (UNCLOS III) has spent nearly a decade drafting a comprehensive treaty to govern the many uses of the ocean, which is, unfortunately, a fatally flawed document that is inimical to American interests. The proposed treaty's seabed provisions violate philosophical, as well as practical, interests, and legitimatize principles that would have an adverse impact in future international negotiations. The benefits of the treaty's non-seabed articles do not outweigh these significant disadvantages. A substantial amendment of the Draft Convention is necessary. Only a treaty that recognizes that free market seabed mining and commercial exchange exploit no one will increase the prospects for free exchange, free trade, economic prosperity and even world peace.

INTRODUCTION

"[T]he international community owns, and runs, everything beyond 200 miles and can hand the bill to U.S. taxpayers and consumers." Former U.S. Senator Lee Metcalf.[1]

The Third Conference on the Law of the Sea has spent nearly a decade drafting a comprehensive treaty to govern the use of the oceans of the world. The current Draft Convention (or draft treaty) encompasses subjects such as navigation, pollution, fish-

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1. Quoted in Johnston, *Geneva Update* in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 179 (Amacher & Sweeney eds. 1976).

ing rights, economic zones, and seabed mining, in an attempt to provide some benefits for every nation.

Unfortunately, the resulting package is a fatally flawed document that is inimical to American interests—both philosophical and pragmatic. Unless the Draft Convention is substantially amended, it is unlikely that the Reagan administration will sign, or that the United States Senate will ratify, a comprehensive law of the sea (LOS) treaty.

It was concern over these flaws in the Draft Convention that led the United States, just days prior to the start of the Ninth UNCLOS Session, to announce its intention to conduct "a policy review" before concluding negotiations and to remove the Carter holdover delegation leaders.[2] Since the review was not completed by the start of the Tenth Session in August, negotiations were not completed; and the Conference set a "final" eight week session to begin March 8, 1982, in New York.[3]

The conventional wisdom appears to be that the Administration initiated the review at the behest of United States mining companies.[4] While it is true that potential seabed mining-related companies have been critical of the Draft Convention,[5] there are

2. Inner office release of the Law of the Sea Interagency Group, March 2, 1981.

3. *Law of Sea Conference Decides to Issue "Official Draft Convention," But to Allow For Continued Negotiations on "Certain Outstanding Issues,"* 1 U.N. Doc. SEA/146 (Aug. 24, 1981) (on file with the author) (Press Release, U.N. Office at Geneva, Information Service). This deadline is an obvious attempt to pressure the U.S. to complete its review. Nevertheless, this is not the first "final" session, despite the uncompromising official rhetoric—Conference President Tommy Koh said that "We have postponed adoption of the convention by a year, and we will not wait for it any longer." Laure Speziali, Le Courrier (Geneva), World Opinion, Aug. 26, 1981, issue No. 34, at 1, *reprinted by* Public Affairs Office, U.S. Mission, Geneva (on file with the author) (informal discussions between our delegation and others at the Tenth Session suggest that additional time would be provided if the U.S. was seen as negotiating in good faith).

4. *See* Dickson, *Scuttling the Sea-Law Treaty*, NATION 665 (1981). This charge has also been a dominant theme in the foreign press. *See, e.g.*, Valentin Vasilets, *U.S. Changes Stance*, Tass, March 5, 1981, in FOREIGN BROADCAST INFORMATION SERVICE (FBIS), 145 WORLDWIDE REPORT 1 (JPRS 77654, March 24, 1981); Smolik, *In the Service of Monopolies: Why Has Washington Launched a Torpedo Against the Law of the Sea Treaty*, Bratislava (Cz) Rolnicke Noviny, March 12, 1981, at 5, *reprinted by* FBIS, 146 WORLDWIDE REPORT 10-11 (JPRS 77689, March 27, 1981); *Marine Seabeds: World Patrimony*, Lima (Peru) Expresso, March 21, 1981, at 14, in FBIS, 152 WORLDWIDE REPORT 9 (JPRS 77919, April 24, 1981); *U.S. Volte-Face*, Delhi (India) National Herald, March 26, 1981, at 7, in FBIS, 151 WORLDWIDE REPORT 6 (JPRS 77904, April 22, 1981); *The Need for a Law of the Sea*, London Financial Times, March 17, 1981, at 18, in FBIS, 151 WORLDWIDE REPORT 4-5.

5. *See, e.g.*, letter from Richard Siebert, Vice President, National Association of Manufacturers to Secretary of State Alexander M. Haig (Oct. 8, 1981) (on file with the author); letter from David A. Herasimchuk, Director-Corporate Development, Global Marine, Inc. to Doug Bandow (Nov. 6, 1981) (on file with the author); letter from William I. Milwee, Jr., President, Searle Consortium, Ltd. to Doug

important philosophical and pragmatic objections to the proposed treaty unrelated to the welfare of industry. As treaty critic Michael McMenamin has pointed out:

> It is not the State Department's duty here to negotiate enough procedural safeguards in the UNCLOS treaty to guarantee the existing seabed mining consortia an adequate short-term return on their investment. . . . A principle is involved here that should not be compromised . . . no matter how many procedural safeguards are [included].[6]

The most serious concerns are with the seabed mining sections of the Draft Convention. The Convention establishes an International Seabed Authority, governed by an Assembly and a Council, which would regulate private deep seabed mining. The Authority would be empowered to deny permission to mine for a variety of reasons and is specifically charged to favor the interests of the developing and other so-called disadvantaged States. The Draft Convention would also create and subsidize an Enterprise to mine the seabed for the Authority.

PHILOSOPHICAL OBJECTIONS

The first set of objections to this seabed regime are philosophical. Attention paid to philosophy by past commentators has been sparse.[7] Unfortunately, this mirrors the focus of the UNCLOS delegations for the United States and other industrialized countries, which have addressed the negotiations primarily in economic terms.[8]

The result was "an ideological vacuum"[9] that was filled by the developing countries and their allies, that viewed the Conference as the forum to conquer "greed and selfishness, prejudices and

Bandow (Nov. 1, 1981) (on file with the author); letter from M.R. Bonsignore, Vice President, Honeywell to Doug Bandow (Nov. 5, 1981) (on file with the author).

6. McMenamin, *Battle of the Seabed*, INQUIRY, July 6 & 20, 1981, 17, 22. *Accord*, Statement of Northcutt Ely before the Senate Foreign Relations Committee 2 (Sept. 30, 1981) (on file with the author). *See Dragging on Law of the Sea*, Washington Star, March 8, 1981, at F-2, col. 1.

7. A notable exception is Goldwin, *Locke and the Law of the Sea*, COMMENTARY 46-50 (1981).

8. Comment, *UNCLOS III: The Remaining Obstacles to Consensus on the Deepsea Mining Regime*, 16 TEX. INT'L L.J. 79, 109 (1981). An example of such a lack of interest in philosophy on the part of the U.S. negotiators is provided by former U.S. delegation leader Elliot Richardson in a briefing memo prepared for policymakers. E. Richardson, *Law of the Sea—An Overview*, (June 24, 1981) (on file with the author).

9. Lilla, *Third World's Sea Pact Takes U.S. for a Ride*, Wall St. J., Jan. 26, 1981, at 30, col. 3.

worn out economic doctrines."[10] By seizing the philosophical high ground and effectively setting the agenda of discussion, the developing countries "foreordained the result of the conference before it even began."[11]

Indeed, the seabed negotiations of UNCLOS have been almost entirely an ideological struggle to define the meaning of the phrase "common heritage of mankind."[12] Every seabed provision embodies ideological conflict; if "it were an argument over short term economic interests alone the issues would have been settled already."[13]

By focusing on the technical and economic issues, the industrialized countries gave up their strongest and most consistent arguments—those of philosophy. The Reagan administration is no longer willing to cede the moral high ground, as it believes its principles of government and economics to be right and worth defending.

The fundamental philosophical precept involved is the Lockean notion that property ownership devolves on those who identify natural resources and mix their labor with them: "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."[14] Vesting ownership of previously unowned resources in producers—those who expend labor and capital, who take risks, who have the greatest connection to the resource—has substantial historical support.[15]

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10. Remarks of Jens Evensen, Ambassador of Norway, at the informal plenary, 3 (Aug. 10, 1981). *Accord*, Comment, *supra* note 8, at 109.

11. Goldwin, *supra* note 7, at 48.

12. One need not reject the phrase, which is embodied in the draft treaty. Draft Convention on the Law of the Sea, U.N. Doc. A/CONF.62/WP. 10/L.78/art. 136 (1981) [hereinafter referred to as Draft Convention]. One need only define it as "a continuing right of free and nondiscriminatory access, free of production controls, free of restraints of accommodation and restraint of trade." Ely, *Commentary at American Enterprise Conference*, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 149, 150 (R. Amacher & R. Sweeney eds. 1976).

13. Comment, *supra* note 8, at 108.

14. Goldwin, *John Locke*, in HISTORY OF POLITICAL PHILOSOPHY 451, 462 (L. Strauss & J. Cropsey eds. 2d ed. 1981). *Accord*, M. ROTHBARD, FOR A NEW LIBERTY 31-37 (2d ed. 1978); Goldwin, *supra* note 7, at 47-48.

15. Indeed, vesting ownership of natural resources in producers has an international precedent in the Spitzbergen Archipelago case. Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 INT'L LAW. 796, 807-11 (1973).

It was also the method used to develop the American West. Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. LAW & ECON. 168-79 (1975); Statement of Robert W. Poole, Jr., President of Reason Foundation, before the Subcommittee on Oceanography, House Committee on Merchant Marine and Fisheries, 5 (Oct. 22, 1981). Indeed, civil law was often absent; during the California gold rush, for example, by mutual agreement by miners, title "was derived from the first locator, and continuity of work sufficed to maintain persistance of ownership." T. RICHARD, A HISTORY OF AMERICAN MINING 33 (1932). *Accord*, Goldie *supra*, at 804-07.

Because no contrary comprehensive international agreement has yet been ratified by all nations, the traditional notion of freedom of the high seas and open access to ocean resources is still customary international law, giving American miners the right to mine.[16] Since there is no environmental need for regulation[17] nor any economic justification for regulation, other than to delineate property rights,[18] the UNCLOS should have built upon existing customary law to create a system for vesting and protecting resource property rights of individuals to explore and develop the seabed.[19]

Instead, "[n]ations have come to the conference table as if they were stockholders, each with an equal share of stock and the equal voting right that goes with it."[20] Their notion of common ownership goes far beyond even the traditional notion of common access to common property,[21] and they view nation States as part owners of natural resources over which they have no control, or contact with, and which they will not help develop. This is simply an attempt to supplant the moral basis for property ownership, serving "not as a moral guide, but as an escape from morality."[22]

This new concept of the "common heritage of mankind" necessarily places the well-being of some nations and individuals arbitrarily ahead of those of others. In the case of the seabed, the

16. H. Knight, Legal Aspects of Current United States Law of the Sea Policy 7-8 (paper presented to AEI Conference: United States Interests in Law of the Sea: Review and Analysis (Oct. 19, 1981); Goldie, *supra* note 15, at 797; speech by Secretary of the Navy John Lehman to World Affairs Council 3 (Oct. 9, 1981) (on file with the author); Comment, *supra* note 8, at 87. The developing countries argue to the contrary, but their case is generally unpersuasive. See *id.* at 85, 90-98.

17. R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES 225 (1979).

18. Tollison & Willett, *Institutional Mechanisms for Dealing with International Externalities: A Public Choice Perspective*, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES, 77, 85-86 (Amacher & Sweeney eds. 1976). Eckert even argues that creating an international body to vest property rights is undesirable if the economics of the industry make the regulation more costly than any problems resulting from the lack of regulation, such as poaching. ECKERT, *supra* note 17, at 24.

19. American Minerals Congress, Undersea Mineral Resources, 2 (Sept. 27, 1981) (on file with the author). Obviously, some reasonable compromise in an international negotiation may be necessary. There are approaches, such as revenue sharing, that could be taken to help the people in the developing countries. But the proposed seabed regime is not intended to help the people of the developing countries.

20. Goldwin, *supra* note 7, at 48.

21. Comment, *supra* note 8, at 99.

22. RAND, CAPITALISM: THE UNKNOWN IDEA 20-21 (1967).

interests of the ruling establishment in a few developing countries are to take precedence over the fundamental rights of all individuals, including those of citizens of developing countries; the oligarchy of a few will appropriate in the name of the many.[23]

Accepting these self-serving common heritage precepts has guaranteed a draft treaty that offends other fundamental values as well. For instance, the creation of an International Seabed Authority which can restrict entry into the market, set production limitations, and mandate the transfer of technology violates miners' and consumers' rights of economic liberty. The type of intervention proposed by the draft treaty should be "excluded as generally inadmissible in a free society . . .," being one of the "kinds of governmental measures which should be precluded on principle and which could not be justified on any grounds of expediency."[24]

Such a right to economic freedom arises from the natural right of self-ownership and the necessary corollary right to transfer and trade the fruits of one's own labor.[25] It also arises as a necessary adjunct—indeed, prerequisite—to political freedom, by restricting the general authority of government over people and creating counterforces to concentrated government power.[26]

The creation of the Enterprise, with the many monopolistic advantages accorded it, such as funding and technology transfer, violates the general American principle of opposition to monopolies.[27] This concern should be greatest with respect to government monopolies because government monopolies possess not only economic power, but also political power; and they are able to use that power to insulate themselves from economic

23. *Cf. id.* at 21 (discussion of "the common good"); ROTHBARD, *supra* note 14, at 32 (discussion of the "world communal solution").

24. F. HAYEK, THE CONSTITUTION OF LIBERTY 220-21 (1960).

25. ROTHBARD, *supra* note 14, at 39. *Cf.* HAYEK, *supra* note 24, at 230 (discussion of relationship between individual freedom and freedom of contract).

26. M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 2-3 (1980); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 83-84 (1980); Berger, *Speaking to the Third World*, COMMENTARY 29, 31 (1981). *Cf.* Statement by President Ronald Reagan at the Opening of the International Meeting on Cooperation and Development 2 (Oct. 22, 1981) (on file with the author) (discussion of economic freedom and "human progress"). So fundamental are these rights that the framers of the Constitution viewed their protection as the "prime object of government." SIEGAN, *supra*, at 83. And despite the passage of 200 years, the reasons for preserving economic liberty remain just as essential. SIEGAN, *supra*, at 83; Speech by President Ronald Reagan to the World Affairs Council of Philadelphia 9 (Oct. 15, 1981) (on file with the author).

27. This general policy is most obviously manifested by the antitrust laws. *See, e.g.*, 21 CONG. REC. 2455 (1890) (Remarks of Senator Sherman). Such concern extends to foreign commerce. *See, e.g.*, W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 201-22 (2d ed. 1973).

forces.[28]

Finally, the favoritism shown the Enterprise through, for example, extensive financial and technological subsidies amounts to discrimination against private individuals, violating the fundamental American abhorrence of governmental "discrimination in any form."[29] Indeed, "[t]he role of Government is to protect [men] in the enjoyment of their rights and make certain of their equality of opportunity."[30] Agreeing to a Seabed Authority that so blatantly discriminates against American citizens violates these general concerns of equal opportunity.

PRACTICAL OBJECTIONS

The second set of objections to the seabed regime is practical in character. The seabed mining provisions of the Draft Convention pose two significant dangers: restricting the world supply of minerals and, in particular, our access to strategic minerals; and creating a pernicious precedent for future international negotiations.

Restricting Access to Minerals

The first danger focuses on our importation of minerals for industrial production. Increasing the world supply of minerals would be economically beneficial to the United States and the rest of the world. It has been estimated that preventing any seabed mining from taking place could cost consumers in the United States alone more than $100 million (1979 dollars) annually by 1990, and more than one billion dollars (1979 dollars) by the early part of the next century.[31]

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28. Former President Coolidge once warned that "This country would not be the land of opportunity, America would not be America, if the people were shackled with government monopolies." Acceptance speech by President Calvin Coolidge (Aug. 14, 1924), in H.L. MENCKEN, A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES 807 (1942).

29. Letter from Senator John F. Kennedy to Mrs. Emma Guffey Miller, Chairman of the National Woman's Party (Oct. 21, 1960), *reprinted in* S. REP. No. 994, 87th Cong., 1st Sess. 689 (1961).

30. Answer by Senator John F. Kennedy to question No. 5 submitted by the Associated Press (Sept. 26, 1960), *reprinted in* S. REP. No. 994, 87th Cong., 1st Sess. 1055 (1961).

31. Johnston, *The Economics of the Common Heritage of Mankind*, 13 MARINE TECH. SOC'Y J. 26, 29 (1979-1980). It is of note that seabed mining would benefit the developing countries as well as developed countries, since most are minerals consumers. Johnston, *supra* at 28-29. *Cf.* 1 A. SMITH, THE WEALTH OF NATIONS 461-62 (1937) (discussion of how wealthy neighbors economically benefit poorer nations).

Mining also has strategic significance, since we import more than ninety percent of our supply of many critical minerals, such as cobalt, vital to the aerospace industry, and chromium, necessary to make stainless steel.[32] A seabed mining industry could greatly reduce our dependence on potentially unstable overseas suppliers because seabed mineral nodules, containing cobalt, manganese, nickel, and copper, are "abundantly strewn across the ocean floor."[33] Though the potential for an effective "OPEC" of minerals may be unlikely, at least in the short-term,[34] seabed supplies will become more important in the future as land-based mineral supplies are depleted.[35]

The proposed treaty would severely threaten this potentially abundant source of mineral resources. The free market economy is "by far the most productive form of economy known to man."[36] Regulation generally limits experimentation and productivity and raises costs—in other words, makes it more difficult for the market to function.[37] Indeed, studies of the effects of economic regulation in area after area consistently find it to be inefficient, counter-productive, and frequently perverse.[38]

Seabed mining is no exception. Virtually any regulatory structure will pose inefficiencies and misallocations, but the restrictive regime proposed by the Draft Convention is "unique . . . in the

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Moreover, some developing countries, such as India, may become seabed miners. *See Ocean Floor Discoveries "Stun" Major Powers*, The Times of India (Bombay), March 16, 1981, at 5, in FBIS, 154 WORLDWIDE REPORT 3-4 (JPRS 78026, May 8, 1981); *Huge Carpet of Manganese Nodules Discovered*, Kuala Lumpur (Malaysia) Business Times, March 17, 1981, at 18, in FBIS, 154 WORLDWIDE REPORT 5 (JPRS 78026).

32. Holden, *Getting Serious About Strategic Minerals*, 212 SCIENCE 305-07 (1981).

33. Keating, American Citizen and the Minerals Squeeze 6 (Aug. 1, 1980) (to be published). *Accord*, R. ECKERT, *supra* note 17, at 214-19; Johnson & Logue, *Economic Interests in the Law of the Sea Issues*, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 37 (Amacher & Sweeney eds. 1976).

34. Frank, *Jumping Ship*, 43 FOREIGN POL'Y 121, 129-30 (1981); Darman, *The Law of the Sea: Rethinking U.S. Interests*, FOREIGN AFF. 373, 385 (1978); REPORT ON THE U.N. THIRD CONFERENCE ON THE LAW OF THE SEA HOUSE COMM. ON FOREIGN AFFAIRS, 97th Cong., 1st Sess. 10 (Comm. Print 1981) (Resumed 10th Sess., Cong. Benjamin Gilman).

35. Darman, *supra* note 34, at 386. *Cf.* STAFF OF SENATE COMM. ON INTERNAL AND INSULAR AFFAIRS, 92D CONG., 1ST SESS., REPORT ON THE UNITED NATIONS SEABED COMMITTEE THE OUTER CONTINENTAL SHELF AND MARINE MINERAL DEVELOPMENT 9 (Comm. Print 1971) (discussion of recent expropriations of American overseas mining operations and concluding that "the United States would do well to make sure that our rights to the seabed are not lost to some of the puerile developing nations").

36. ROTHBARD, *supra* note 14, at 40. *See* Ronald Reagan statement, *supra* note 26, at 2.

37. HAYEK, *supra* note 24, at 224, 228.

38. For an excellent survey of more than 50 studies of economic regulation, see SIEGAN, *supra* note 26, at 283-303.

degree to which" it will promote inefficiency.[39] This is because the specific provisions of the Draft Convention are virtually antithetical to the goal of seabed mining. The problems include:[40] bias against production, technology transfer, lack of assured and non-discriminatory access, discrimination in favor of the Enterprise, Authority costs, hostile investment climate, and review conference.

Bias Against Production

Instead of encouraging seabed mining development, the goals of the Authority are anti-development, including "orderly and safe development," "rational management," "just and stable prices remunerative to producers," and "the protection of developing countries from the adverse effects [of minerals production]."[41] The attempt to protect land-based producers, industrialized as well as developing, has been embodied in an article explicitly setting a production ceiling and providing for commodity agreements.[42]

Technology Transfer

The Draft Convention requires that private contractors, as a pre-condition to receiving mining licenses, obligate themselves to sell their proprietary seabed mining and processing technology to other operators and to transfer such technology to the Enterprise

39. R. ECKERT, *supra* note 17, at 297, 245-50. The dollar loss to the world community, as well as the U.S., could run into the millions, if not billions, of dollars. Johnson & Logue, *supra* note 33, at 47-50; Johnston, *supra* note 31.

40. Even some supporters of the treaty acknowledge problem areas, though they believe that the problems are generally either insignificant or remediable. *See* letter from Lee Kimball, United Methodist Law of the Sea Project, to Doug Bandow (Nov. 24, 1981) (on file with the author); Memorandum from Samuel R. Levering, (Chairman of the Marine Environmental Subcommittee of the LOS Advisory Committee), *et al.* to James Malone (July 28, 1981) (on file with the author). The list is not exhaustive: political issues involving U.S. budget commitments and participation by liberation groups are in controversy but do not affect the viability of seabed mining.

41. Draft Convention, *supra* note 12, art. 150 paras. (a), (e), (q).

42. Draft Convention, *supra* note 12, art. 151. And the countries of Zimbabwe, Zambia, and Zaire, particularly, would like to tighten these restrictions even further. *See, e.g.*, remarks of Mr. Kakwaka, representative of Zaire, to the 66th General Committee meeting (Aug. 24, 1981), in U.N. Doc. A/CONF.62/BUR/SR.66, at 5 (1981); Law of the Sea Conference to Resume Tenth Session at Geneva Beginning 3 August, 5-6, U.N. Doc. SEA/140 (1981) (Press Release, United Nations Office at Geneva Information Service).

and to developing States.[43] Though the circumstances under which such transfer would occur are limited and compensation is provided for, such transfers would still amount to a forced sale and could never be fair to the private contractors.[44]

Lack of Assured and Nondiscriminatory Access

The access criteria for seabed mining are theoretically nondiscriminatory;[45] but the initial contract approval process under the Legal and Technical Commission could easily be politicized.[46] Indeed, a private company must: obtain a contract to explore two seabed sites at its own expense, ceding one to the Authority; face competition from other potential miners for the other site; avoid disqualification for violating the anti-density provisions (which restrict the number of sites per country in a geographical area) and the anti-monopoly provisions (which restrict the number of contracts awarded to any particular country); and successfully gain a production authorization from an Authority dominated by the developing and Socialist Bloc countries.[47]

Discrimination in Favor of the Enterprise

The Enterprise would benefit from a donated mine site, subsidized financing, exemption from payments to the Authority, tax exemptions, and transferred technology.[48] These competitive disadvantages would include explicit special consideration granted to developing countries and particularly to "land-locked and geographically disadvantaged" countries.[49]

Authority Costs

The Authority would be an expensive undertaking, with the United Nations Secretary-General estimating annual costs of between $41 and $53 million and initial building costs of between

43. Draft Convention, *supra* note 12, Annex III, art. 5.

44. This provision results in an apoplectic reaction from businessmen. *See, e.g.*, Letter from Hilton Davis, Vice President, Legislative and Political Affairs, Chamber of Commerce of the United States of America, to Senator Pressler (Oct. 26, 1981) (on file with the author); letter from Dolan K. McDaniel, President, Geophysical Service, Inc. to Doug Bandow (Nov. 16, 1981) (on file with the author); letter from Louis I. Schneider, Jr., Vice President-Manager, Marine Division, Teledyne Exploration to Doug Bandow (Nov. 6, 1981) (on file with the author).

45. Comment, *supra* note 8, at 103.

46. *Id.* at 103; Ely, *supra* note 6, App. 7-9; Remarks by Theodore Kronmiller, before the Conference on Economic Aspects of National Security and Foreign Policy: The Challenge to a Free Enterprise Society 5-6 (Dec. 13, 1981) (on file with the author).

47. Ely, *supra* note 6, App. 1-13.

48. *Id.* at 17-19.

49. Draft Convention, *supra* note 12, art. 152, para. 2.

$104 and $225 million.[50] Such costs may be understated, considering the current plans for an 89,000 square foot building in Jamaica[51] and the expansive plans for activities of the Authority.[52] To fund the Authority, private firms would have to pay an application fee, an annual fee, and a production charge and/or royalty charge.[53] Thus, the total cost may be very high.[54]

Hostile Investment Climate

The overall effect of these provisions is to "create a political climate hostile to private investment, and . . . [to so] restrict the usefulness of the investment as to make it unattractive even if the political climate were benign."[55] It seems unlikely that unsubsidized United States investment, if any investment, would occur under the terms of the Draft Convention.[56]

To the extent that seabed mining occurs, it would occur even if the United States does not sign the treaty and United States flag operations do not develop. Such production would still yield economic benefits to the United States.[57]

Moreover, contrary to the prevailing wisdom and the public statements of the potential mining firms, there is at least a possibility of seabed mining without the treaty. This is so if the geographical and technological characteristics of seabed mining

50. Press Release SEA/140, *supra* note 42, at 6-7.

51. Telegram from American Embassy in Kingston, Jamaica to Secretary of State (Nov. 1981) (on file with the author).

52. *Study on the Future Functions of the Secretary-General under the Draft Convention and on the Needs of Countries, Especially Developing Countries, for Information, Advice and Assistance Under the New Legal Regime*, U.N. Doc. No. A/CONF.62/L.76 (Aug. 18, 1981).

53. Draft Convention, *supra* note 12, Annex III, art. 13, paras. 2-4.

54. Ely, *supra* note 6, App. 20-26; Comment, *supra* note 8, at 104-06.

55. Ely, *supra* note 6, at 3.

56. American Minerals Congress, *supra* note 19, at 2-3; Johnston, *supra* note 31, at 28; Tinsley, The Financing of Deep-Sea Mining, 14-15 (paper presented to AEI conference Oct. 19, 1981) (on file with the author).

Treaty proponents argue that even if this is the case, no mining will occur without a treaty. Therefore, refusing to sign the treaty gains no seabed benefits, while losing the other benefits, such as for navigation. Richardson, *supra* note 8. The problem with this argument is that it ignores the treaty's philosophical context and its adverse political precedents. These turn the seabed provisions into a net negative if there were insufficient offsetting benefits from encouraging seabed mining.

57. James L. Malone, US Interests in LOS, 5-6 (speech at AEI conference Oct. 19, 1981) (on file with the author).

create *de facto* property rights.[58]

Review Conference

Even if the provisions of the draft treaty were satisfactory, they could be amended by a two-thirds vote of the member States after a review conference meets, fifteen years after the commencement of commercial production under the ratified treaty.[59] The developing countries could simply terminate the right of private companies to mine, and customary international law might then preclude unilateral mining.[60]

International Precedence

Of even greater practical danger is the precedential impact that signing the draft treaty would have: the legitimization of the principles of the New International Economic Order (NIEO), which essentially seeks to impose a legal duty on wealthier nations to redistribute the wealth of their citizens to the governments of the developing nations.[61] These principles are at variance with the Administration's views on foreign assistance—that "the key to national development and human progress is individual freedom—both political and economic."[62]

UNCLOS is critical for NIEO proponents. This proposed Law of the Sea treaty would be the leading edge of the attempt to instill NIEO principles in all international organizations and institutions and over other global problems, including energy, Antarctica, and outer space.[63] Thus, "in a single stroke, the direction of the sys-

58. Eckert, United States Interests and the Law of the Sea Treaty: Myths Versus Reality, 3-5 (paper presented to AEI Conference Oct. 19, 1981) (on file with the author); Eckert, The Wealth Distribution and Economic Efficiency Consequences of the New Law of the Sea, 14-15 (paper presented to the 14th Annual Conf. of the Law of the Sea Institute, Kiel, FRG Oct. 20-23, 1980) (on file with the author). Others share his belief that claim jumping is unlikely. Tollison & Willett, *supra* note 18, at 86.

59. Draft Convention, *supra* note 12, art. 155.

60. Comment, *supra* note 8, at 107.

61. *Id.* at 112. The use of NIEO has been likened to economic warfare by the developing on the developed States. Letter from Gary Knight, Professor, Louisiana State University Law School to Ted Kronmiller 22-23 (April 22, 1981) (on file with the author). For a more detailed discussion of the NIEO, see Berger, *supra* note 26, at 31; Berryman & Schifter, *A Global Straitjacket*, REGULATION 19-28 (Sept./Oct. 1981).

62. Remarks by President Ronald Reagan to the Opening Session of the Annual Meeting of the Boards of Directors of the World Bank Group and the International Monetary Fund, 17 WEEKLY COMP. OF PRES. DOC. 1052-55 (Sept. 29, 1981); Speech by President Ronald Reagan to the World Affairs Council (Oct. 15, 1981) (on file with the author); statement by the President, *supra* note 26, at 2. *See* The North-South Nexus, THE NEW REPUBLIC, Nov. 4, 1981, at 5-7; Berryman & Schifter, *supra* note 61, at 28.

63. Knight, Legal Aspects of Current United States Law of the Sea Policy, 5-6

tem of international development assistance would be radically altered. The compulsory transfer of wealth from the developed to the developing countries would become a reality of international law. . . ."[64]

A refusal to sign the proposed LOS treaty would deny the developing countries this essential first step in turning the NIEO into reality. It would help forestall the creation of other negotiating forae and international structures to regulate other international economic issues.[65]

INADEQUATE BENEFITS FROM NON-SEABED ARTICLES

The draft treaty does encompass subjects other than seabed mining, including economic zones, marine research, environmental protection, and navigation. Most treaty proponents argue that even if the seabed mining provisions are flawed, the benefits accruing to the United States from the other parts of the treaty, and particularly the navigation provisions, would make the proposed treaty worthwhile.[66]

The Administration is looking at the net benefits of the Draft Convention to the United States.[67] However, lest economic interests be "sacrificed in the perceived furtherance of narrow politico-military objectives and amorphous foreign policy goals,"[68] the benefits of other sections of the resulting treaty must clearly outweigh the significant costs of the seabed mining portion of the treaty.

Unfortunately, the benefits of the other sections of the treaty do not outweigh the disadvantages of the seabed mining provisions. For instance, under the treaty, we would eventually have to share revenue from petroleum production from the outer margins of the

(paper presented to AEI conference Oct. 19, 1981) (on file with the author); Berryman & Schifter, *supra* note 61, at 22-23; Kronmiller, *supra* note 46, at 3; Comment, *supra* note 8, at 81.

Indeed, key concepts from the draft treaty are embodied in the U.N. Moon Treaty. Remarks of Theodore Kronmiller before the Center for Strategic and International Studies and the Oceans Policy Forum, 7 (Feb. 21, 1980) (on file with the author). *See* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, U.N. No. A/34/664 (Nov. 12, 1979).

64. Kronmiller, *supra* note 46, at 3.

65. Comment, *supra* note 8, at 81; Dickson, *supra* note 4, at 668.

66. *See, e.g.*, letter from Clifton Curtis, *et al.*, Center for Law and Social Policy to James L. Malone (July 30, 1981) (on file with the author).

67. Lehman, *supra* note 16, at 6.

68. Kronmiller, *supra* note 46, at 1.

continental shelf, thereby discouraging a source of energy that is nearer-term than most synthetics.[69] The boundary provisions have been criticized as unsound and artificial.[70] Marine scientific research would be subjected to a restrictive "consent" regime.[71] The fisheries articles would add little to American and customary international law.[72] And it has been contended that the pollution articles would be only marginally beneficial, if not actually harmful.[73]

Most importantly, the navigational articles would not be a major improvement: there "is no enhanced value from navigation in the treaty to trade away."[74] For example, the draft treaty retreats from free navigation under current customary international law by providing for weapons testing as a basis to temporarily suspend innocent passage in territorial seas.[75]

Similarly, traditional freedoms of the high seas currently prevail in areas beyond territorial waters. However, the proposed treaty would establish 200 mile, economic zones without providing explicit protection for freedom of navigation. Instead, the language is ambiguous.[76] Ambiguities also bedevil the straits passage articles, making it unclear as to which straits are international and whether or not submerged passage of submarines is provided for.[77]

In any case, our security interests in straits passages are very limited because of geography and technology and thus do not appear to be critical.[78] Further, commercial and economic interests make it likely that such straits will be open to commercial naviga-

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69. Johnston, *Petroleum Revenue Sharing from Seabeds Beyond 200 Miles Offshore*, 14 MARINE TECH. SOC'Y J. 28-30 (1980); Knight, *supra* note 16, at 10.

70. Hedberg, *Evaluation of U.S.-Mexico Draft Treaty on Boundaries in the Gulf of Mexico*, 14 MARINE TECH. SOC'Y J. 32-34 (1980); Hedberg, *Ocean Floor Jurisdictional Boundaries for the Bering Sea*, 14 MARINE TECH. SOC'Y J. 47-53 (1980).

71. Knight, *supra* note 16, at 11.

72. *Id.* at 11-12. Indeed, some observers have sharply criticized them. *See* Eckert, *supra* note 58, at 11-12.

73. Eckert, *supra* note 58, at 12-13.

74. Knight, *supra* note 16, at 9.

75. Kronmiller, *supra* note 63, at 2.

76. Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 67-71 (1980); Kronmiller, *supra* note 63, at 2; Knight, *supra* note 16, at 9.

77. Reisman, *supra* note 76, at 66, 71-75. Relying on some sort of "understanding" years later on this point is perilous, shortsighted, "preposterous," and "naive." *Id.* at 74-75.

78. Osgood, *U.S. Security Interests and the Law of the Sea*, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 11, 13-24 (R. Amacher & R. Sweeney eds. 1976); Darman, *supra* note 34, at 376; Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 OR. L. REV. 759, 780-82 (1972); Osgood, *U.S. Security Interests in Ocean Law*, 2 OCEAN DEV. & INT'L L. 1, 11-24 (1974).

tion even in the absence of a LOS treaty.[79]

But even if the Draft Convention were to effectively protect critical interests in theory, it must protect them in practice as well, for "[t]o sacrifice U.S. mineral interests for a perceived military objective is at least debatable; but to sacrifice U.S. mineral objectives in mining the deep seabed for what may be an *unattainable* military objective is folly . . . ."[80] Unfortunately, the amount of protection in practice seems dubious. (Indeed, since the Soviet Union is more dependent on straits passage than the United States, whatever protection the draft treaty may afford the United States may give a comparatively greater benefit to the Soviet Union.[81])

The navigation articles would be subject to amendment, just like the rest of the treaty.[82] There is also a chance that some nations containing key straits might not sign the treaty. If they did not, it seems unlikely that they would comply with a provision which they refused to sign.[83]

Finally, such navigational guarantees are likely to be commonly supported only so long as it is in both parties' interests to do so. History is replete with examples of countries breaking treaties

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79. Johnson & Logue, *supra* note 33, at 64; Kronmiller, *supra* note 63, at 3. This is the case even among countries who lack respect for international law, as was demonstrated during the recent Iran-Iraq war. Johnston, Not So Dire Straits, (presented at AEI conference) (on file with the author). (One panelist claimed that there were other—undisclosable—reasons for the straits of Hormuz remaining open. Johnston responded that whatever the reasons, they proved his point.). For a general discussion of the economic interests of countries in commercial navigation, see R. ECKERT, *supra* note 17, at 74-79.

80. *Report on the Outer Continental Shelf*, *supra* note 35, at 10. Interestingly, although Elliot Richardson now believes that the seabed mining articles are acceptable, he has written that:

> to sacrifice not only the guarantees of freedom of navigation and overflight discussed in this article but other gains as well, including effective protection of the marine environment, a stable regime for marine scientific research, and a workable definition of the outer limits of coastal-state jurisdiction over the oil and gas resources of the continental margin . . . would be an outcome preferable, nevertheless, to being bound by a system incapable of attracting the private investment without which the wealth of the deep seabeds will continue to lie in total darkness miles beneath the surface of the ocean.

Richardson, *Power, Mobility and the Law of the Sea*, 59 FOREIGN AFF. 902, 917-18 (1980).

81. Darman, *supra* note 34, at 377; Frank, *supra* note 34, at 127; Richardson, *supra* note 80, at 911-12 (Richardson believes that independent reasons for greater mobility outweigh these arguments. *Id.* at 912-14).

82. Ely, *supra* note 6, at 87.

83. Osgood, *supra* note 78, at 34-35.

when they have considered it to be in their national interest.[84]

The international guarantees of a LOS treaty are therefore likely to have only marginal effect. First, significant protection for the few straits with real national security value would likely be available through bilateral or regional treaties,[85] informal arrangements,[86] or some combination thereof.[87] And whatever the arrangement, the most important factors which would insure compliance are ability, willingness,[88] and the state of the bilateral relations.[89]

Second, to the extent that our national interests would be less well protected without a LOS treaty, it seems fair to assume that the United States would not allow theoretical international law claims to stand in the way of protecting vital national needs.[90] Similarly, if a coastal State believed that its national interest required interdiction of United States shipping and also that United States force either would not, or could not, be applied to prevent such interdiction, it seems unlikely that they would not do so because of a general treaty signed by 150 nations in a past year.[91]

Thus, without a LOS treaty, the impact on navigation would likely be felt in these cases where neither parties' national interests were critically at stake. The results would not be "disastrous"; rather, they would be "marginally less efficient."[92] Eliminating this "marginal inefficiency" would be a benefit, but it would not be substantial enough to justify acceptance of the draft

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84. L. BEILENSON, THE TREATY TRAP v. (1969); Stine, *A Cynic's View of the Moon Treaty*, ANALOG 103, 104-05 (May, 1980). For a recent example involving U.S/ Mexican fishing agreements, *see* Department of State Press Release, "Mexico Terminates Agreements with U.S. On Fishing" (Dec. 31, 1980).

85. Eckert, *supra* note 58, at 8. In fact, one important nation approached the U.S. in Geneva and indicated a willingness to reach an agreement with the U.S. on transit rights, similar to the terms of LOS, if the U.S. did not sign the LOS.

86. Osgood, *supra* note 78, at 31, 34-35. Indeed, Osgood contends that "[t]here is evidence, on the other hand, that some kinds of arrangements that accommodate U.S. and coastal or strait states' interests can more readily be reached if they are not made the subject of international legal agreements." *Id.* at 27.

87. Gary Knight believes that "U.S. security and economic interests could be sufficiently protected through a combination of domestic legislation, limited treaties, purchases of rights, unilateral action, and the occasional application of force." Knight, *Alternatives to the Law of the Sea Treaty*, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 133, 147 (R. Amacher & R. Sweeney eds. 1976).

88. Richardson, *supra* note 80, at 906; Knight, *supra* note 63, at 17.

89. Osgood, *supra* note 78, at 31.

90. *Id.* at 25, 29-30; Richardson, *supra* note 80, at 908.

91. Eckert, *supra* note 58, at 8; Osgood, *supra* note 78, at 27.

92. Darman, *supra* note 34, at 382. This is not to say that it would be costless, of course: just not prohibitively expensive even in the worst case. *See* R. ECKERT, *supra* note 17, at 71-74; Osgood, *supra* note 78, at 25-26, 29; Osgood, *supra* note 78, at 35.

seabed mining regime.[93]

CONCLUSION

A substantial amendment of the Draft Convention is called for. The Administration's major areas of concern, as expressed to the Tenth Conference, were:

1. Gaining influence in the Authority commensurate with our political and economic interests.
2. Creating a more balanced Council.
3. Setting as an overriding objective for the Authority encouraging mineral development.
4. Removing obstacles to mining by American companies.
5. Assuring non-discriminatory and certain access to mining.
6. Requiring ratification by all member states for approval of amendments.
7. Eliminating unreasonable interference with mining operations.
8. Minimizing the budgetary impact of the treaty.[94]

Achieving substantial improvements across-the-board may be exceedingly difficult. Virtually all of the other delegates at the Conference warned the United States that the fundamentals of the treaty were non-negotiable.[95] American treaty proponents have also emphasized the same point: major concessions are unlikely.[96]

The Administration also recognizes this fact;[97] but to fail to ask

93. The Secretary of the Navy has explicitly stated that our navigational interests do not require us to sign the current Draft Convention. Lehman, *supra* note 16, at 4.

94. Statement by James L. Malone to the informal plenary, 4-5 (Aug. 13, 1981) (on file with the author).

95. *See* Statement by K. Brennan, AO, leader of the Australian Delegation to the informal plenary, 3 (Aug. 10, 1981) (on file with the author); statement by K. Brennan to the informal plenary, 5-7 (Aug. 17, 1981) (on file with the author); statement by Prof. W. Riphagen, Chairman of the Delegation of the Netherlands to the informal plenary, 2 (Aug. 17, 1981) (on file with the author); remarks by Inam Ul-Haq, Representative for Pakistan and Chairman of the Group of 77, at 11 (Aug. 17, 1981) (on file with the author); Remarks of Jens Evensen, Ambassador of Norway at the informal plenary, 10-13 (Aug. 10, 1981) (on file with the author).

Indeed, at least one foreign diplomat says a decision by America to ask for fundamental changes will be taken as a decision to kill the treaty outright. Anwar, *Minitreaty Among Big Powers Would be Countered by Maxitreaty*, NEW STRAITS TIMES, (Kuala Lumpur, Malaysia), June 5, 1981, at 14, in FBIS, 165 WORLDWIDE REPORT 1 (JPRS 78713, Aug. 10, 1981).

96. Frank, *supra* note 34, at 137; letter from Curtis, *supra* note 66, at 1; letter from Lee Kimball, *supra* note 40.

97. Speech by James L. Malone at the University of Virginia's Ocean Policy Forum 2 (Nov. 12, 1981) (on file with the author); speech by Theodore Kronmiller to the Marine Technology Society 3 (Sept. 9, 1981) (on file with the author);

for substantial changes would leave us with a proposed treaty fundamentally unacceptable to the Administration and the Senate.[98] Admittedly, to ask may court potential failure of a Conference more than a decade in the making. However, the question of what kind of global order is being created is of paramount importance. Indeed:

> the notion of conceding [the negative international precedents set by the proposed treaty] to avoid the precedent of Conference "failure" (meaning "lack of agreement") seems absurd. It would be to trade long-term, substantive failure for avoidance of temporary procedural failure. Trading these objectional elements for marginal gains in the system of environmental protection and dispute settlement seems out of proportion. Trading them for questionable interests in treaty protection of distant-water military mobility seems a tie to the past at the expense of the future. And trading them to protect interests that might just as well be protected without a comprehensive treaty seems no trade at all.[99]

From the start, the UNCLOS has melded together subjects that should have been negotiated separately. It has accepted outrageous demands as a basis of negotiation and neglected to protect fundamental American principles. It would seem that the UNCLOS Draft Convention has become an agreement sought for agreement's sake, as if the mere signing of any agreement, whatever its substance, could guarantee international stability.

But this proposed treaty will not—cannot—guarantee international stability. Only a treaty that recognizes that free market seabed mining and commercial exchange exploit no one will do so. A treaty must be fashioned to meet the interests of mankind and not just those of leaders of an *ad hoc* majority of the world's nation States. Only then would the prospects of free exchange, free trade, economic prosperity, and even world peace be increased, rather than decreased.

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speech by Theodore Kronmiller to American Mining Congress Convention 9 (Sept. 9, 1981) (on file with the author).

98. Speech by Malone, *supra* note 97, at 2.

99. Darman, *supra* note 34, at 388.